

INQUIRY CONCERNING A ) Supreme Court  
JUDGE, NO. 00-319 ) Case No. SC00-2510  
JOSEPH P. BAKER )  
\_\_\_\_\_) )

This Response is submitted in opposition to the motion filed by Judge Joseph P. Baker to dismiss the formal charges against him. The Motion to Dismiss should be denied for several reasons:

1. The Rules of the Florida Judicial Qualifications Commission make no provision for a motion to dismiss. Under the Commission's Rules, an Investigative Panel consisting of members of the Commission is charged with the responsibility for investigating the conduct of Florida judges to determine whether there is probable cause to institute formal charges. The Commission's Rules then provide that upon the filing of Formal Charges, "the judge may serve and file an Answer," following which "the Hearing Panel shall receive, hear and determine formal charges from the Investigative Panel" (Rules 7 and 9). Although Rule 12 provides that "in all

proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or as otherwise provided by these rules," a motion to dismiss is inappropriate where the Rules specifically provide for a hearing to determine probable cause and for the Judge to file an answer to the charges.

2. The Motion to Dismiss raises the same argument as previously made before the Investigative Panel in a "Written Response" to the Notice of Investigation, in Judge Baker's sworn testimony before the Investigative Panel and in a "Motion for Reconsideration" submitted prior to the filing of the Notice of Formal Charges. On December 5, 2000, the Motion for Reconsideration was denied and the charges filed finding that probable cause exists for formal proceedings to be instituted against Judge Baker. Under the Rules of the Commission, the matter should now proceed to a hearing before the Hearing Panel.

3. The gravamen of Judge Baker's argument that the formal charges should be dismissed because there is no controlling legal precedent prohibiting a trial judge, without the knowledge or participation of the parties or the attorneys, from consulting with experts in a case being tried before him to assist him in determining whether there is

competent evidence to support the jury's award of damages to the plaintiff. Judge Baker contends that Canon 3B(7), which provides that "a judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . ." is not applicable because the Judge's communications with the unidentified experts were neither an "ex parte" communication nor an "other communication" outside the presence of the parties within the meaning of the Canon.

Judge Baker's narrow interpretation of the Canon overlooks the commentary to Canon 3B(7) which makes it clear that the conduct with which he is charged is proscribed. Thus, the commentary provides that "the proscription against communications concerning a proceeding includes communications from lawyers, law teachers and others who are not participants in the proceeding, except to the limited extent permitted."<sup>1</sup> The commentary further provides that "an appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief as an amicus curiae."

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<sup>1</sup> Judge Baker does not contend that his communications with experts fall within one of the permitted exceptions under Section 3B(7)(a) of the Canon.

More specifically, the commentary states that "a judge must not independently investigate facts in a case and must consider only the evidence presented." This is precisely what Judge Baker did, as reflected in his Memorandum of Ruling; he independently investigated facts relating to the proper calculation of damages. He included in his ruling the disclosure that, without the knowledge or participation of counsel for the parties, he "made a few inquiries of computer consultants and experts, describing the general nature of [determining changes in software and the cost of duplicating those changes] and asking if there were a practical way to approximate the cost to a retailer to take the original UBS software and bringing it up to the 'modified version' and use at Disney. . . . They [the consultants and experts] suggested that UBS must know the cost of developing its own original software purchased by Disney" (Memorandum of Ruling, p.8).

Judge Baker contends that there is no authority prohibiting his conduct. However, in State v. Romano, 34 Wash.App. 567, 662 P.2d 406 (Wash.App. 1983), the trial judge, while he had under consideration the sentencing of a defendant, contacted at least two friends in the jewelry business to verify the defendant's statements that his

earnings as a jewelry salesman were seasonal. The Washington appellate court found this to be an improper ex parte communication prohibited by the Washington Code of Judicial Conduct, and reversed and remanded for resentencing by another judge. In Gimbel v. Laramie, 5 Cal.Rptr. 88, 181 Cal.App.2d 77 (Cal.App. 1960), the judge, in a bench trial of an automobile accident case, after the case had been submitted for decision, advised counsel that from his examination of photographs of the steering wheel he was unable to detect any damage which would indicate that the driver had been thrown forward violently and further disclosed that he had asked a friend, an amateur photographer, to examine the photographs and that that friend had been unable to detect any evidence of damage to the steering wheel. Although the California appellate court did not consider the state's Code of Judicial Ethics, it stated that the procedure constituted a denial of due process. In Wilson v. Armstrong, 686 So.2d 647 (Fla. 1st DCA 1996), the District Court of Appeal held that it was improper for a circuit judge, in ruling upon an objection to an estate accounting, to visit with and consult the estate's accountant to discuss the substantive objections to the accounting. The Court held that this communication was "clearly improper under the Code of Judicial Conduct, Canon 3." (686 So.2d at

648.) Although not in effect at the time the order disallowing the objections was entered, the Court expressly took into consideration the comments to Canon 3B(7), including the fact that "the commentary to Canon 3 specifically prohibits a trial judge from independent investigating facts in a case." (Id. At 648.)<sup>2</sup> There is, therefore, ample authority to support the formal charges, both in the commentary to the Canon and in the case law of the State of Florida.<sup>3</sup>

4. The motion to dismiss does not address the other canons which Judge Baker is charged with violating: Canon 1, which provides that a judge shall uphold the integrity of the judiciary; and Canon 2, which provides that a judge shall

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<sup>2</sup> Judge Baker might contend that Wilson is not on point because the trial judge consulted with the estate's accountant, who was affiliated with one of the parties. The accountant, however, had not appeared as a witness and, in any event, the judge's consultation with the accountant constituted a prohibited independent investigation of the facts. See also Fremont Indemnity Co. v. Workers' Compensation Appeals Board, 200 Cal.Rptr. 762, 153 Cal.App.3d 965 (Cal.App. 1984) (judge's communications with court-appointed independent medical examiner to clarify the record held to violate the California Code of Judicial Conduct).

<sup>3</sup> Judge Baker insists that the prohibition against ex parte communications is limited to communications by or on behalf of one of the parties. This appears to be the definition of "ex parte" as used in Black's Law Dictionary, but the term is commonly used to refer to communications with disinterested third parties. State v. Romano, supra; Universal Business Systems, Inc. v. Disney Vacation Club Management Corp., 768 So.2d 7 (Fla. 5th DCA 2000).

avoid the appearance of impropriety. In In Re: Marriage of Wheatley, 297 Ill. App. 3d 854, 697 N.E. 2d 938 (Ill. App. 1998), a case relied upon by Judge Baker in his motion to dismiss, the trial judge in a custody case received a letter purportedly from a U.S. Congressman intended to influence the judge's decision. Although the judge maintained that he did not read the letter and that it did not influence him, the court held that the fact that the trial judge did not disclose the receipt of the improper communication to the parties during the trial and during his deliberations and while drafting his judgment in the case created the appearance of impropriety, which lead to the judgment being vacated and the case remanded for a new trial before a different judge. Similarly, the court in State v. Romano, supra, held that the trial judge's communications with friends in the jewelry business to verify the defendant's testimony constituted an appearance of impartiality. So, in this case, while Judge Baker is not charged with a willful violation of the Code of Judicial Conduct, his "ex parte" consultation with experts in this case clearly gives the appearance of impropriety, which, in light of Judge Baker's inability to appreciate the import of his conduct, must be addressed in a formal hearing.





For the foregoing reasons, the motion to dismiss should be denied.

Respectfully submitted,

Thomas C. MacDonald, Jr.  
Florida Bar No. 049318  
100 N. Tampa Street, Suite 2100  
Tampa, Florida 33602  
(813) 221-2500  
(813) 226-8826 (Facsimile)

General Counsel for the Florida  
Judicial Qualifications Commission

- and -

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE  
Professional Association

By \_\_\_\_\_  
Charles P. Pillans, III  
Florida Bar No. 0100066  
The Bedell Building  
101 East Adams Street  
Jacksonville, Florida 32202  
(904) 353-0211  
(904) 353-9307 (Facsimile)

Special Counsel to the Florida  
Judicial Qualifications Commission

Certificate of Service

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to the following by United States Mail, this \_\_\_\_\_ day of January, 2001:

David B. King, Esquire  
Mayanne Downs, Esquire  
King, Blackwell & Downs, P.A.  
25 East Pine Street  
Post Office Box 1631  
Orlando, Florida 32802-1631  
**Attorneys for Joseph P. Baker**

Ms. Brooke S. Kennerly  
Executive Director  
Judicial Qualifications Commission  
The Historic Capitol, Room 102  
400 S. Monroe Street  
Tallahassee, Florida 32399-6000

John R. Beranek, Esquire  
Post Office Box 391  
Tallahassee, Florida 32302-0391  
**Counsel to the Hearing Panel**

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Attorney